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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

~~No. 83~~ 71-83

LIEUTENANT JOHN A. STRAIT,

Petitioner,

—v.—

HONORABLE MELVIN R. LAIRD, Secretary of Defense; HONORABLE STANLEY R. RESOR, Secretary of the Army; LIEUTENANT GENERAL STANLEY LARSON, Commanding General, Sixth United States Army; MAJOR GENERAL PHILIP B. DAVIDSON, JR., Commanding General, Fort Ord, California; COLONEL JOHN H. HOFFMAN, Commanding Officer, United States Army Reserve Components Personnel Center, Fort Benjamin Harrison, Indiana,

Respondents.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

MELVIN L. WULF
JOEL M. GORA
American Civil Liberties Union
156 Fifth Avenue
New York, New York 10010

MICHAEL N. POLLET
1345 Avenue of the Americas
New York, New York 10019

Attorneys for Amicus Curiae

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Lieutenant John A. Strait,

Petitioner,

—v.—

Honorable Melvin R. Laird, Secretary of Defense; Honorable Stanley R. Resor, Secretary of the Army; Lieutenant General Stanley Larson, Commanding General, Sixth United States Army; Major General Philip B. Davidson, Jr., Commanding General, Ford Ord, California; Colonel John H. Hoffman, Commanding Officer, United States Army Reserve Components Personnel Center, Fort Benjamin Harrison, Indiana,

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

Interest of *Amicus**

The American Civil Liberties Union is a nationwide, non-partisan organization of over 160,000 members, engaged solely in the defense of those liberties guaranteed by the Bill of Rights. In its fifty-year existence it has been

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* Letters of consent from the petitioner and the respondent to the filing of this brief pursuant to Rule 42(1) have been filed with the Clerk of the Court.

particularly concerned that procedural remedies, especially ones such as the Great Writ, be fully available to rectify the denial of civil liberties.

In recent years, the American Civil Liberties Union has provided legal representation to hundreds of servicemen who have sought release from military custody because their rights of free expression, religious liberty, or due process of law have been infringed. While habeas corpus has been the primary vehicle for safeguarding those substantive rights, federal courts have utilized other remedies, such as mandamus, to afford relief to the serviceman's underlying claim on the merits.

In addition, the American Civil Liberties Union participated as *amicus curiae* in *Schlanger* v. *Seamans*, 28 L. Ed.2d 251 (1971), where we urged a flexible reading of the habeas corpus statutes to allow district court jurisdiction in such cases. It has been our experience that the *Schlanger* decision, as interpreted by certain federal courts like the one below, has caused substantial hardship for the class of litigants represented by Lieutenant Strait. Indeed, one of the undersigned counsel is the attorney for the petitioner in *Arlen* v. *Laird*, —— F. Supp. —— (S.D.N.Y. 1971), *app. pending*, No. 71-1446, a case almost identical to the instant one, where the District Court held that it had no jurisdiction to consider the merits of the petition.

Your *amicus* submits that certiorari should be granted so that petitioners like Lieutenant Strait will be afforded a forum to litigate their constitutional claims.

Reasons for Granting the Petition for Certiorari

1. Lower court decisions interpreting *Schlanger* v. *Seamans, supra,* have caused great difficulties and uncertainties for the class of litigants represented by this petitioner.

In *Schlanger,* this Court dealt with the situation of an active-duty serviceman with a regular duty station in Georgia. He brought his habeas corpus petition in the District of Arizona where he was on temporary assignment. The Court held that since there was no proper respondent within that District, the court was without jurisdiction over the petition.

Sergeant Schlanger's situation was an exceptional one. The vast majority of active duty servicemen are assigned to the same post as their commanding officer; the unique jurisdictional problems which were presented in *Schlanger* rarely arise. In addition, there may have been some uncertainty about that petitioner's ultimate right to relief on the merits. The Court may have felt that these two factors minimized the need for the expansive reading of the relevant statutes which the petitioner and the *amicus curiae* urged upon the Court.

Here, however, Lieutenant Strait is *typical* of a large class of servicemen confronted with the identical jurisdictional problems. Like thousands of others, he is a reserve officer with a delayed active duty obligation. As such, he is attached to no reserve unit, and, of course, to no regular post. His activities are controlled by the United States Reserve Components Personnel Center at Fort Benjamin Harrison, Indiana, although he has never been there. All of his relevant contacts with the Army have occurred in

the Northern District of California, where he resides and where he brought this action. Virtually the identical factual pattern is represented in *Arlen* v. *Laird, supra; Eisel* v. *Resor*, —— F. Supp. ——, Misc. Civ. 71-28-J (D. Mass. 1971) (distinguishing *Schlanger* and granting injunctive relief), and a number of other cases of which counsel for *amicus curiae* are aware. Yet, decisions like the one below are likely to leave these petitioners—many of whom, like Lieutenant Strait, assert clearly valid claims—without an effective forum to seek a judicial resolution of those claims. In addition, uncertainty as to the proper forum can be highly prejudicial as, for example, when the adverse administrative decision is rendered short days before the applicant is scheduled to report for active duty.

In sum, the uncertainties generated by this Court's decision in *Schlanger* have had a substantially adverse effect on the class of litigants represented by the petitioner here. A writ of certiorari should be granted so that the Court can determine whether the *Schlanger* decision can properly control these reservist cases.

2. The question presented here was specifically left undecided in *Schlanger*.

On the facts presented in *Schlanger*, this Court held that there was no proper respondent within the reach of the process of the District Court, even though the commanding officer's "arm was long and petitioner was effectively subject to his orders and directions." 28 L. Ed. at 253. The Court went on to note that,

> There are cases which suggest that such control to establish custody may be adequate for habeas corpus jurisdiction even though the control is exercised from

> a point located outside the State, as long as the petitioner is in the district or the State. Donigian v. Laird, 308 F. Supp. 449. For reasons to be stated, we do not reach that question here. 28 L. Ed.2d at 253-4.

The instant case, of course, presents this precise question, specifically reserved in *Schlanger*.

There are persuasive reasons why cases like the instant one are indeed different from *Schlanger*. For example, the petitioners will usually be long-term residents of the district where they file suit and will rarely have been in the district where the record-keeping center is located; most of the contacts relevant to the administrative proceeding will have been there. See, Hanson, *The Jurisdictional Bases of Federal Court Review of Denials of Administrative Discharges from the Military*, 3 SSLR 4001, 4007 (1971). Finally, to hold, with the Court below, that thousands of inactive reservists scattered throughout the country must come to Indiana to litigate their claims is to exalt "the mysteries of Army bookkeeping" over the judicial vindication of substantial federal claims. *Feliciano v. Laird*, 426 F.2d 424, 427, n. 4 (2d Cir. 1970).

3. There are jurisdictional bases, apart from habeas corpus, to sustain the District Court's power to act.

The petition for certiorari suggests that in addition to its authority under the habeas corpus statutes, the District Court was empowered to hear this case pursuant to other jurisdictional provisions, most importantly, the mandamus jurisdiction conferred by 28 U.S.C. Section 1361, taken together with the venue provisions of 28 U.S.C. Section 1391. At this point little can be added to the petitioner's

analysis of the increasing use of mandamus to remedy arbitrary action by federal officials. We would, however, point out that if both habeas corpus relief, as well as the other forms of relief suggested by the petitioner, are held to be unavailable, then the petitioner and countless others who have a right to be discharged from the Army, will be denied an effective remedy. Such a result is not consonant with our concepts of due process. See *Ex Parte Young*, 209 U.S. 123 (1908).

CONCLUSION

For the reasons set forth above, *amicus curiae* respectfully urges the Court to grant the writ of certiorari.

Respectfully submitted,

MELVIN L. WULF
JOEL M. GORA
American Civil Liberties Union
156 Fifth Avenue
New York, New York 10010

MICHAEL N. POLLET
1345 Avenue of the Americas
New York, New York 10019

Attorneys for Amicus Curiae

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